

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

STEVE HOWARD,

Plaintiff, Cross-defendant and
Respondent,

v.

TAMARA BAILEY,

Defendant, Cross-complainant and
Appellant,

BAILEY and ASSOCIATES
MANUFACTURER'S REPS
INCORPORATED,

Defendant, Cross-defendant and
Appellant.

G054270 consol. w/ G054461 &
G054552

(Super. Ct. Nos. 30-2009-00315225
& 30-2011-00473977)

O P I N I O N

Appeals from a judgment of the Superior Court of Orange County, Mary
Fingal Schulte, Judge. Affirmed in part; Reversed in part and remanded.

Humphrey + Law, J. Scott Humphrey and James T. Grant for Defendant, Cross-complainant, and Appellant Tamara Bailey.

The Morten Law Group, Aaron B. Fairchild and Warren D. Morten for Defendant, Cross-defendant, and Appellant Bailey and Associates Manufacturer's Reps Incorporated.

Buley Law, Michael J. Buley, Lisa A. Navarro, and Michael J. Wright for Plaintiff, Cross-defendant, and Respondent Steve Howard.

* * *

This complex business dispute was litigated in two phases, generating five separate appeals. In Phase 1, the trial court considered five causes of action that were part of a shareholder derivative lawsuit filed by Tamara Bailey (Bailey) on behalf of Bailey and Associates Manufacturer's Reps Incorporated (BAMRI), against Cremach Tech, Inc. (Cremach).¹ After the court found in Cremach's favor, we considered Bailey's appeal requesting a new trial, and BAMRI's appeal seeking reversal of a postjudgment attorney fee order. In an opinion filed concurrently with this one, we concluded all of Bailey's contentions on appeal regarding Phase 1 lacked merit and we affirmed the judgment in Cremach's favor. (*Bailey v. Cremach* (Apr. 10, 2019, G054026) [nonpub. opn.] (*Bailey I*)). However, we reversed the court's postjudgment order holding BAMRI liable for attorney fees incurred in a meritless shareholder's derivative lawsuit, which it did not initiate. (*Bailey I, supra*, G054026.)

In Phase 2, the trial court considered five lawsuits; three complaints filed by Steve Howard (Howard) and two cross-complaints filed by Bailey. After a lengthy trial, the court issued a 41-page statement of decision. To briefly summarize, the court

¹ Cremach also does business as Creative Machining Technology. In the briefing, some of the parties refer to Cremach as "Creative." For the sake of clarity, and to avoid confusion, we will refer to the company as Cremach in this opinion.

determined Bailey was not entitled to recover on any of her claims and she must repay profits she wrongfully took from BAMRI. The court ruled BAMRI must be involuntarily dissolved, and it appointed a receiver to wind up the corporate affairs. In separately filed appeals, Bailey and BAMRI seek reversal of the involuntary dissolution order and appointment of a receiver. In addition, Bailey argues she is entitled to a new trial on claims raised in her shareholder derivative action. She challenges the court's order requiring her to make a restitution payment to BAMRI before the final accounting is complete.

We conclude the trial court's ruling on the complaint for involuntary dissolution must be reversed because the sole named defendant, BAMRI, was not given notice of the trial date and did not participate in the proceedings. Despite the fact BAMRI retained legal counsel, the matter was improperly adjudicated in its absence by the corporation's two shareholders and their attorneys, who were merely appearing "on behalf" of the corporation. The entire involuntary dissolution action must be remanded for a new trial after proper notification to all the parties named in that complaint. In addition, we reverse all orders entered to facilitate BAMRI's involuntary dissolution, such as the appointment of a receiver. Finally, the court's judgment reflects it did not rule on two causes of action, believing they raised the same issues as the involuntary dissolution complaint. Those causes of action concerned issues relating to Howard and Bailey's partnership, not BAMRI. Accordingly, we conclude the court's ruling on those claims must be remanded for further proceedings. In all other respects, the judgment is affirmed.

FACTS AND PROCEDURAL BACKGROUND

Many background facts leading to Phase 2 were discussed in detail in *Bailey I, supra*, G054026. Accordingly, we incorporate by reference our summary of facts in *Bailey I*, and resume where we left off, adding facts relevant to this appeal where necessary.

I. The Five Lawsuits Litigated in Phase 2

The primary issue raised in both Bailey's and BAMRI's appeals is whether the court lacked authority to order the involuntarily dissolution of BAMRI. In a nutshell, they maintain BAMRI did not have notice of the trial and, alternatively, the lawsuit was not properly before the court. Consideration of this issue requires a brief review of the procedural history of the five lawsuits, focusing on relevant dissolution allegations, consolidation orders, bifurcation orders, and pretrial motions.

A. Howard's Individual Action

Howard filed three separate complaints. His first lawsuit filed in October 2009 was against Bailey, as an individual. Because he dismissed the libel and defamation claims before trial, the only remaining cause of action was for declaratory relief. He alleged BAMRI was a partnership governed by an agreement called the "Bailey and Associates Manufacturer's Reps Incorporated Buy-Sell Agreement" (Buy-Sell Agreement). Despite Howard's many requests to dissolve the partnership, Bailey refused to terminate the Buy-Sell Agreement and Howard sought "a judicial determination of their respective rights and liabilities." He also requested a "mandatory injunction dissolving the business relationship."

B. Howard's Derivative Action

Howard's second complaint, also filed in October 2009, was against Bailey, alleging various shareholder derivative claims on behalf of BAMRI (Derivative Action). Although BAMRI was also named as a defendant in the Derivative Action, no cause of action was alleged against it. The Derivative Action alleged causes of action for breach of fiduciary duty, constructive fraud, conversion, unfair business practices, accounting, and unjust enrichment.

C. Bailey's Two Cross-complaints

Bailey filed her first cross-complaint in the Individual Action (Individual Cross-Complaint). She filed her second cross-complaint in the Derivative Action

(Derivative Cross-Complaint).² The Derivative Cross-Complaint was amended several times and the operative version is the fifth amendment, which alleges 19 causes of action against Howard, F&L Industries, Inc. (F&L), and Cremach. BAMRI was also named as a defendant but no specific allegations were raised against it.

In the final version of the Derivative Cross-Complaint, Bailey alleged various shareholder derivative claims on behalf of BAMRI. Relevant to this appeal, the 13th cause of action sought dissolution of the Howard/Bailey partnership based on the allegation Howard misappropriated profits for his own use and this “malfeasance has created an emergency situation in the partnership business.” Bailey alleged, “Irreparable injury will occur to the partnership, in the loss of valued employees and customers, the disintegration of business relationships with vendors, the seizure of partnership properties by creditors, and the impairment of the good name and credit of the partnership and partners, *unless a receiver is immediately appointed* to collect and administer rents and manage the partnership property.” (Italics added.)

D. Consolidation

In May 2010, Judge Peter Polos consolidated the Individual Action and Derivative Action (including the two cross-complaints) and designated the Individual Action case number (No. 30-2009-00315225) as the lead case (hereafter, we will refer to these four consolidated lawsuits as the “315225 Consolidated Action”). This

² Initially, the Derivative Cross-Complaint alleged BAMRI, not Bailey in her individual capacity, was making the allegations. Thereafter, the court accepted the parties’ stipulation and entered a nunc pro tunc order striking BAMRI from the Derivative Cross-Complaint and in its place substituting Bailey in her capacity as a shareholder representative of BAMRI, to pursue those claims derivatively on behalf of BAMRI.

consolidation of the two separate shareholder derivative actions meant BAMRI was named as both a nominal defendant and a nominal cross-defendant.³

As a nominal defendant, BAMRI did not have to present a defense because technically no causes of action were raised against it. Howard's and Bailey's shareholder derivative lawsuits were brought "on behalf" of BAMRI because the corporation did not initiate the action. (See *Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108 (*Grosset*) [discussion of corporation's status in shareholder derivative actions].)

E. *Howard's Dissolution Action*

The court consolidated the four 2009 lawsuits before Howard filed his third complaint in May 2011, petitioning for the involuntary dissolution of BAMRI as provided for in Corporations Code section 1800⁴ (Dissolution Action). Howard alleged the two 50 percent shareholders (himself and Bailey) were "so deadlocked" that BAMRI could no longer conduct its business. The complaint named a single defendant—BAMRI.

Howard also filed a "notice of related case" in the 315225 Consolidated Action. He informed the court that the newly filed Dissolution Action related to the consolidated actions filed by himself and Bailey.

Although not contained in our record, the parties do not dispute BAMRI filed a demurrer to the Dissolution Action. The trial court mentioned the demurrer in its final statement of decision, noting BAMRI asserted the lawsuit simply repeated the allegations pled in Howard's declaratory relief claim contained in the 315225 Consolidated Action. The trial court never ruled on the demurrer.

³ "When a derivative suit is brought to litigate the rights of the corporation, the corporation is an indispensable party and must be joined as a nominal defendant. [Citations.]" (*Grosset, supra*, 42 Cal.4th at p. 1108.)

⁴ All further statutory references are to the Corporations Code, unless otherwise indicated.

As will be seen from our summary of the case's procedural history, this demurrer marks the beginning of the thread of confusion regarding the two distinct dissolution issues that five years later caused havoc for the parties and the trial court. Somehow over the passage of time, the shareholders jumbled together the "dissolution issues." For this reason, we find it helpful to repeat the distinction before continuing with the procedural history. Howard's declaratory relief claim and Bailey's 13th cause of action both concerned issues regarding the Howard/Bailey partnership created by the Buy-Sell Agreement. This legal question was separate from whether the court had grounds to order BAMRI's involuntary dissolution, which requires a special proceeding authorized by section 1800 (the Dissolution Action).

II. Pretrial Procedural History

A. *Motion to Bifurcate Granted & Two Notices of Election*

In June 2012, the court scheduled a hearing to discuss bifurcating the issue of "dissolution and the trial thereon giving the continuing deadlock and dissention as to all corporate decisions between equal shareholders and directors Howard and [Bailey]." The court scheduled a hearing for the end of August 2012. Howard filed briefing in support of bifurcation and also requested the court appoint a receiver "in light of Douglas Mitchell's July 10, 2012 resignation as [c]ourt-appointed [r]eceiver and provisional [d]irector of BAMRI."

At the beginning of August 2012, for reasons that are not clear in our record, the court vacated the hearing date. At the end of August 2012, BAMRI retained a new attorney, Diane Mancinelli (of Mentis Law Group).

In early September 2012, the trial court reinstated the motion and scheduled a hearing date. Howard filed briefing in support of bifurcation and appointment of a receiver. His counsel, Michael Buley, filed a supporting declaration. In the declaration, Buley noted the Dissolution Action was previously identified as a "related case" to the 315225 Consolidated Action. Buley attached correspondence with opposing counsel

showing the parties had contemplated filing a stipulation to consolidate the Dissolution Action with the other lawsuits. However, the stipulation was never filed and the Dissolution Action still had the status of a related case.

Meanwhile, BAMRI's new attorney filed three documents in the Dissolution Action on November 7, 2012. First, Mancinelli withdrew BAMRI's demurrer to the Dissolution Action. Second, she filed BAMRI's answer to the complaint. Third, she filed BAMRI's notice of election to purchase Howard's shares pursuant to section 2000.

The following day, November 8, 2012, Bailey's attorney, Scott A. Kron, who was representing Bailey in her Derivative Cross-Complaint, filed in the 315225 Consolidated Action a notice of election to purchase Howard's shares pursuant to section 2000. The moving papers stated Bailey elects to purchase "if BAMRI does not elect to purchase Howard's shares . . . or if the parties have not agreed, and cannot agree, upon the fair value of such shares . . . within the time specified"

The two notices of election essentially created a stay of the Dissolution Action, because purchasing shares of the person seeking dissolution is an alternative to an involuntary dissolution. (§ 2000, subds. (b) & (c) [dissolution proceedings stayed if parties unable to agree on fair value of shares requiring court appointed appraiser].)

The same day Bailey filed her notice of election, Judge Luis Rodriguez issued a minute order in the 315225 Consolidation Action granting the bifurcation motion. In addition to this ruling, the minute order stated, "The court clarifies for the parties that the Involuntary Dissolution Action . . . was in fact consolidated by the court with the other two cases [the 315225 Consolidation Action's case numbers] (See

[December 16, 2011] Minute Order filed in the Dissolution Action).”⁵ The court stated the parties “should be prepared at the hearing to set a trial date for the Dissolution Action *and* [the] issue of dissolution of BAMRI.” (Italics added.) It denied without prejudice Howard’s request to appoint a new receiver. It scheduled a court trial for June 17, 2013. Counsel for BAMRI, Bailey, and Howard attended this hearing.

This minute order was confusing because it suggested the Dissolution Action was different from the issue of BAMRI’s dissolution. In reality, BAMRI’s dissolution was the only issue to be decided in the Dissolution Action. Moreover, because the issue of BAMRI’s involuntary dissolution was not one of the claims raised in the 315225 Consolidated Action, the issue could not be bifurcated from that trial. Fortunately, the parties sought clarification about the order and Judge Rodriguez entered orders that indicated he understood there was a distinction between dissolution of the Howard/Bailey partnership and the involuntary dissolution of the corporation.

In May 2013 during a hearing on a discovery dispute, the parties asked questions about the nature of the bifurcated trial. Howard’s counsel stated he needed the documents from BAMRI immediately to prepare for the upcoming “dissolution trial.” Mancinelli asked the court to clarify the issue being litigated in the bifurcated trial scheduled for June 17, 2013. She stated, “I’m a latecomer and my understanding is on June 17th it’s a trial on the [declaratory] relief action as to the dissolving of the business

⁵ The minute order Judge Rodriguez relied on was not an order of consolidation. Rather, it was a minute order generated after a status conference on December 16, 2011. The minute order stated, “There are no appearances by any party. [¶] The matter is off calendar. [¶] Case *previously* consolidated with 30-2009-003158225 *Howard vs. Bailey*.” (Italics added.) In addition to the case number containing a typographical error (the addition of the number 8), the minute order mistakenly stated the case was “previously consolidated.” We have taken judicial notice of the court files in all five lawsuits, and we did not find any court order consolidating the Dissolution Action with the 315225 Consolidated Action.

relationship only between Howard and Bailey, not the dissolution of the company because I represent the company and I don't want the company dissolved."

The court replied, "Yes, the dissolution of the relationship and the evaluation of their respect[ive] interests [as] shareholders and owners of the company. [¶] No, *there is no intention to dissolve the company*. If I intimated that, that was not intended." (Italics added.) The court later clarified, "So the bifurcation . . . was directed and granted to address and to dissolve the relationship, the partnership, . . . between the parties. [¶] And then the claims would--if they were appropriate to the corporation would survive and be addressed in a different proceeding. [¶] But no, from the declaratory relief action was to determine that the rights and obligations on a go-forward basis between the prospective parties in their capacities." (Italics added.) This discussion served to clarify Judge Rodriguez's prior bifurcation order. Judge Rodriguez intended the trial to address terminating the Howard/Bailey partnership, not BAMRI's involuntary dissolution.

A few days before trial, Bailey (represented by a different attorney, Kevin Harr) filed an ex parte application for an order clarifying the scope of the bifurcated trial.⁶ The application was filed in the 315225 Consolidation Action. Howard joined in the application, also seeking further clarification.

On June 14, 2013, Judge Rodriguez considered the ex parte application. The hearing was attended by Howard's counsel (Buley) and Bailey's counsel (Harr). BAMRI's counsel was not present. The court determined that before addressing "the question of what are the partnership rights in the Buy-Sell Agreement, there has to be some underlying financial analysis [as] to what those rights are going to pertain to and how they're going to relate to those rights that are determined by contractual

⁶ We note Bailey attached to her application several pages of correspondence between the parties' attorneys. In one e-mail, Howard's attorney wrote, "[Bailey] acknowledged on November 8, 2012, [at the bifurcation hearing] . . . she and BAMRI sought to derail the dissolution of BAMRI . . . by serving their respective but identical notices of election to proceed under [section 2000]."

interpretation and the intent of the parties.” The court decided to send the matter to a referee to decide “the financial and accounting questions in connection with the declaratory relief as to the contractual rights and obligations so that when and if they’re established, there’s an underlying valuation”

During the hearing, Buley noted the Dissolution Action was a related case, not a consolidated case. The court agreed, indicating it was not consolidated because the court chose an “alternative path” by severing the declaratory relief cause of action and bifurcating the dissolution issue alleged in that claim. Buley sought further clarification on the issues that would be tried at the bifurcated trial. He also asked if the trial would be expanded to include a partial accounting to determine if the parties would be entitled to offsets.

Harr asserted litigation of the declaratory relief action would involve dissolution of the business relationship pursuant to the terms of the Buy-Sell Agreement, which would require a determination of the company’s value. The court stated another issue would be the time of valuation. The court asked if Bailey was using the election to purchase shares as a “backup” to buying shares under the terms of the Buy-Sell Agreement. Harr asserted the election to purchase was “the primary vehicle for accomplishing the sale.” Harr believed the section 2000 election to purchase was a “preemptive strike to declare” one of the conditions for sale under the Buy-Sell Agreement was satisfied.

The court issued a minute order vacating the scheduled trial on the bifurcated dissolution issue and sent the matter to a referee for “[a]ccounting [i]ssues.” The court told the parties to prepare an order “with a series of accounting issues not related to the legal rights re[garding the] buy/sell agreement.” The court stated it would pick a referee and after receiving a report it would set a trial on “the [third] [c]ause of action with [a]ccounting [i]ssues [a]ddressed.”

In summary, the parties obtained clarification the bifurcated “dissolution trial” concerned *only* the Individual Action’s declaratory relief claim, requesting an injunction to dissolve “the business relationship” by terminating the partnership pursuant to the Buy-Sell Agreement. Moreover, the parties and the court agreed the Dissolution Action had not been consolidated with the other lawsuits. It remained a “related action” that was trailing the 315225 Consolidated Action.

Before the “dissolution trial” took place, the five lawsuits were reassigned to Judge Mary Fingal Schulte. On June 20, 2014, Judge Schulte issued a minute order in the Dissolution Action stating, “On [c]ourt’s own motion, matter currently set for [July 23, 2014] . . . in this department is continued to [September 12, 2014] . . . to be heard with *the related matter* [of the 315225 Consolidated Action].” (Italics added.)

The next minute order in the 315225 Consolidated Action, dated September 19, 2014, further clarified the procedural status of the case. Judge Schulte asked counsel to prepare a notice of ruling stating the following: (1) “With dismissal of the criminal proceeding against Steve and Kelly Howard, the stay . . . in the above-referenced proceedings, is lifted[;] [¶] (2) Trial in the above-referenced *consolidated* matters [the 315225 Consolidated Action] shall commenced June 1, 2015 . . . [;] [¶] (3) Trial in the *related* involuntary dissolution matter [the Dissolution Action] *shall trail the trial proceedings of the above-referenced consolidated cases*[;] [¶] (4) The [c]ourt may hereafter deem these matters complex in light of the number of involved parties and claims[;] [¶] . . . [¶] (6) The parties subject to the previously ordered accounting reference . . . to immediately proceed with said accounting” (Italics added.)

In the Dissolution Action, on May 27, 2015, Judge Charles Margines entered a minute order continuing the trial date to November 2, 2015, “to trail the trial proceedings of [the 315225 Consolidated Action].” The court noted the ruling was entered pursuant to the notice of ruling regarding the September 22, 2014, status conference held in the 315225 Consolidated Action.

B. *Dissolution Action Postponed During Phase 1*

Minute orders filed in the Dissolution Action also show the trial was continued to November 2, 2015, “to trail the trial proceedings of” the related and consolidated cases (the 315225 Consolidated Action). Mancinelli and Buley were notified of the continuance.

On November 2, 2015, the court agreed to hold a bench trial on limited issues (Phase 1). Meanwhile, the court continued the Dissolution Action multiple times, first to November 23, 2015, and then to various dates in December 2015.

The court issued its judgment in Phase 1 in February 2016. We have incorporated by reference the details concerning these proceedings in *Bailey I, supra*, G054026. In its statement of decision regarding Phase 1, the court scheduled a trial setting conference on the remaining claims (Phase 2) for March 1, 2016.

III. *Phase 2 & The Dissolution Action*

On March 1, 2016, the court held a trial setting conference in the Dissolution Action. Buley attended the hearing on behalf of Howard. James Grant and J. Scott Humphrey appeared for Bailey. Mancinelli did not make an appearance. We do not have a reporter’s transcript of the hearing. The court’s minute order simply stated that at the conference the court scheduled a trial date for May 2, 2016, and it estimated trial would last 12 days. The minute order states the parties waived notice.

The same attorneys, representing Howard and Bailey, appeared on the first scheduled trial date (May 2, 2016). The reporter’s transcript of the first day of trial reflects the parties and the court understood the trial would proceed on the 315225 Consolidated Action. At the beginning of the trial the court stated, “We’re back for trial on the cross-complaint[s] of [Bailey and Howard], among others. . . . The cross-complaint [sought] dissolution of [the] corporation as well . . . as I recall.” Bailey’s counsel replied, “I think we do have a cause of action in there. The issue will be at the end of the day is whether based upon the . . . facts that are presented to you that there is

something that is appropriate under the circumstances, because if it's the case that there is no money that's being paid to . . . Howard, there's no reason to dissolve the company at this point anyway." The court responded as follows: "Okay. Made it seem like both [parties] were asking for it. I could say, okay, that's off the table."

Neither Bailey nor Howard offered to give the trial court more information about the nature of their dissolution claims, or clarify the issue of BAMRI's involuntary dissolution was not part of the 315225 Consolidated Action. Instead, Howard and Bailey confused matters further by submitting a joint statement of issues in the 315225 Consolidated Action that asked the court to decide whether BAMRI should be dissolved.

The joint statement, filed April 29, 2016, stated the parties "through their counsel of record" offered a list of 17 controverted issues. (Bold and capitalization omitted.) Six issues were listed under the heading, "Steve Howard Declaratory Relief, Dissolution, Breach of Fiduciary Duty, Conversion, Accounting Against Bailey[.]" The remaining issues were listed under the heading, "Bailey/BAMRI Rescission, Breach of Fiduciary, Dissolution, Conversion Action Against . . . Howard . . . [.]" Three items on the list asked the court to determine if BAMRI should be dissolved and what should happen after its dissolution. For example, issue number five asked, "Whether an accounting should be ordered as part of the dissolution and winding up of BAMRI?" Issue number six asked, "Whether, and in what amounts, proceeds of BAMRI are to be distributed between Howard and Bailey upon dissolution?" On the first day of trial, Humphrey obtained permission to add some "sub-issues."

During the trial, the court considered trial briefs, testimony from several witnesses, and numerous trial exhibits. On May 24, 2016, trial concluded with closing arguments and the court deemed the matter submitted after the parties filed posttrial briefs.

IV. PostTrial Briefing Regarding Involuntary Dissolution

We can infer from the posttrial briefing that during closing argument counsel for Bailey opposed BAMRI's involuntary dissolution and then filed a posttrial brief on the issue. Howard indicated he filed a posttrial brief "in response to the unsolicited brief submitted" by Bailey.

In her brief, Bailey argued there needed to be a separate trial on the issue of involuntary dissolution as provided for in section 1800. Bailey maintained the court should reject Howard's claim BAMRI's dissolution was part of his request for equitable relief (the declaratory relief cause of action alleged in the Individual Action). Alternatively, Bailey asserted the court could not order involuntary dissolution because Bailey gave a notice of election to purchase Howard's shares.

Howard's brief argued the issue of involuntary dissolution was properly before the court. He maintained Bailey's argument regarding the need for a separate trial "was not raised prior to the commencement of trial and, in fact, the dissolution action was tried to conclusion of evidence. Such an argument is untimely and must have been raised some reasonable time after the 2009 filing of the original [c]omplaint and well before the conclusion of the trial in this matter." Howard argued Bailey abandoned her section 2000 election to purchase and "cannot belatedly assert it to defeat the court's ability to finally adjudicate this matter." (Capitalization omitted.)

V. Statement of Decision

In August 2016, the trial court issued its tentative statement of decision and gave the parties 10 days to file objections. It provided the following: "The Court has considered and weighed the evidence and assessed the credibility of the witnesses. Credibility of witnesses was an unusually big problem in this trial, as discussed herein." After considering additional argument from the parties, the court filed the final 41-page statement of decision on October 13, 2016. Below is a summary of the numerous rulings.

A. *Statement of Controverted Issues & Stipulated Facts*

The beginning of the statement of decision contains a “statement of controverted issues.” (Capitalization omitted.) The court stated the following: “The parties submitted for the [c]ourt’s consideration essentially five lawsuits, [three] complaints filed by [Howard] . . . and two cross-complaints filed by [Bailey] The parties submitted a [s]tatement of [c]ontroverted [i]ssues, not repeated verbatim herein, which did not identify any specific complaint or cross-complaint, which then required the [c]ourt to sift through each separate pleading, as discussed below. . . . The [c]ourt *binds the parties to that which they indicate are controverted issues*, assuming the issues are properly framed by the pleadings.” (Italics added.) Additionally, the court noted, that “prior to opening statements, [Humphrey] added an additional controverted issue, as stated on the record, which was whether either side acted with malice, oppression, or fraud, due to there being a punitive damage claim by Bailey.”

The court listed all the stipulated facts, including that Howard and Bailey each owned a 50 percent interest in BAMRI and they were the only directors and officers of BAMRI. The court attached to the statement of decision a six-page “timeline chart” listing the facts alleged by each party in the pleadings. The court clarified the chart did not include its summary of the trial testimony. It commented the allegations “lobbied back and forth” between Howard and Bailey “illustrate the overall tenor of this seven years long litigation.”

B. *Individual Action*

The court recognized Howard’s first and second causes of action (libel and defamation) were dismissed, but nevertheless it determined the allegations were “relevant to other claims, and issues of credibility.” Accordingly, the court listed all the alleged defamatory statements, which we need not repeat here.

With respect to the third cause of action seeking declaratory relief, the court determined it was moot “based on the order for an involuntary dissolution.” (Bold

omitted.) It noted the Buy-Sell Agreement listed four events triggering termination of the agreement. The court explained “Howard asserts that a controversy has arisen that requires a judicial declaration of the rights and liabilities of each party . . . as well as a mandatory injunction dissolving the business relationship.” However, “At trial . . . Howard did not specify what exactly he wants the [c]ourt to adjudicate other than, as stated in the [p]rayer for [r]elief: ‘. . . rights and . . . duties under the Buy-Sell Agreement’ and ‘terminating the Buy-Sell Agreement’ This is not the same as a verified complaint for involuntary dissolution. As noted herein, there is a separate complaint for involuntary dissolution. In his trial brief, Howard’s lawyer describes this action as ‘really a poorly pled involuntary dissolution action.’ [Citation.] (. . . Buley’s firm didn’t file this action and substituted in later).” In summary, the trial court acknowledged the cause of action did not seek BAMRI’s dissolution, yet deemed the claim moot due to its decision to order involuntary dissolution of the corporation.

C. Derivative Action

The court ruled in favor of Howard on the breach of fiduciary duty cause of action. After discussing the fiduciary duties listed in the partnership agreement, the court ruled, “The evidence established that Bailey unilaterally removed Howard from company bank accounts, held the meetings without notice to Howard and without his participation. She unilaterally executed corporate resolutions stating she had removed Howard as an officer and director of BAMRI. Since then, Bailey has unilaterally operated BAMRI. These are breaches of the [bylaws] and her fiduciary duties.”

The court noted Bailey terminated Howard’s employment, but this action did not “divest Howard of his interest” and the manner of termination “runs afoul of the clearly defined procedures in [the Corporations Code] for removal of a director.”

It ruled that from October 2009 through April 2013 Bailey received over \$1.3 million in income but made no disbursements to Howard. Additionally, the evidence showed Bailey spent “\$924,000 on non-business related expenses, including

[costs related to her] personal use and legal fees.” Bailey refused to provide Howard any financial information.

The court determined Howard did meet his burden of proof with respect to the constructive fraud, conversion, and unfair business practices causes of action. The court noted Howard’s unjust enrichment cause of action did not raise a theory of liability, but rather a claim for a remedy of restitution. The court ruled, “The extent of restitution, if any, can be determined in the accounting to be ordered as part of [BAMRI’s dissolution].”

With respect to the accounting cause of action, the court agreed with Howard’s assertion Bailey owes him “an unknown balance of money.” (Italics omitted.) In closing argument, Howard asked the court to conduct an accounting. The court stated it was not an accountant and could not serve as an accountant, complaining the statement of decision required two months of work. After issuing the tentative statement of decision, the court noted Howard submitted a proposal for how the accounting should be conducted and the court “adopt[ed] that proposal” as part of the final statement of decision.

The adopted plan was as follows: “The [c]ourt finds there has been an adequate accounting as established at trial, that Bailey took \$924,000 for her own use and benefit from October 25, 2009 through April 2013 and 50 [percent] of that is to be paid back into BAMRI for distribution to Howard upon dissolution. Any further accounting should be limited to BAMRI income and expenses and distributions to Bailey for her use and benefit from May 1, 2013 through present. The parties shall provide the [c]ourt, within 30 days of entry of [f]inal [s]tatement of [d]ecision with [three] names each for an accountant who will conduct the accounting and Bailey will be responsible for the fees and costs associated with this accounting. Any additional funds determined by the accounting to have been in the nature of distributions to Bailey for her use or benefit will

then require Bailey to return 50 [percent] thereof to BAMRI for distribution to Howard upon dissolution.”

D. Dissolution Action

The court discussed the statutory grounds supporting involuntary dissolution of a corporation. The court determined there was cause to order BAMRI’s involuntary dissolution. It granted Howard’s request that the assets, bank accounts, and operations be turned over to a court-appointed receiver at Bailey’s expense. The court ordered the parties to submit the names of three proposed receivers within 30 days. “Here, there are two 50 [percent] shareholders equally divided, deadlocked, and unable to agree as to the management of BAMRI, since Bailey effectively locked Howard out of the company in October 2009. A new receiver must be appointed, to facilitate the dissolution such that matters of accounting, liquidation and allocation of assets, winding up of corporate affairs, and other dissolution-related matters are not left to the sole control of either shareholder.” The court stated its findings as to why the shareholders are deadlocked, Bailey’s misconduct, and the reasons why liquidation was necessary.

In response to Bailey’s posttrial objections, the court addressed its authority to order involuntary dissolution. It took judicial notice of the court’s files in the case, including Judge Rodriguez’s prior orders, and stated the following: “A brief history is in order. It is *very* tortured, and a lot of it predates this judge’s assignment as the trial judge.”

The court noted that in December 2011, Judge Rodriguez *consolidated* the Dissolution Action with the other cases and in June 2012 appointed a receiver. The court stated it could not understand the portion of Judge Rodriguez’s order staying the receiver until after dissolution, but in any event, Mitchell resigned after a few months. It also noted Bailey’s counsel, Stephen Abraham, was disqualified at that time.

The court stated that on November 8, 2012, “Judge Rodriguez entered an [o]rder ‘bifurcating’ the [Dissolution Action]” and scheduled trial for June 17, 2013. The

court recalled Judge Rodriguez denied Howard's request to appoint a new receiver, and sent the matter to a referee to decide limited accounting issues. The court noted Judge Rodriguez selected retired Judge Sundvold to serve as referee on accounting and discovery issues. "That appointment has never been vacated, but, Judge Sundvold does not work for free. Various proposed orders were submitted, numerous 'status conferences scheduled,' until, the matter still not resolved, Judge Rodriguez retired, and the entire litigation was re-assigned to Judge Schulte."

Judge Schulte recalled she determined "'enough is enough'" and issued minute orders in all five lawsuits setting a trial date of June 1, 2015. "Trial was later continued to November 2, 2015. It was agreed the 2011 case for Involuntary Dissolution would trail the 2009 matters, for the time being, but it was no longer stayed."

The court ruled Bailey's "inaction effectively abandoned her election to purchase." It noted Bailey filed the notice of election in 2012, when Judge Rodriguez bifurcated the issue of dissolution so that it could be resolved immediately. Thereafter, "Bailey tendered no purchase offer and did not seek [c]ourt intervention to value the shares and set a purchase price." The court stated it discussed with the parties the status of the trailing Dissolution Action on the first day of Phase 2 and "it was agreed that this matter would no longer trail but, given that . . . Bailey sought involuntary dissolution in her cross-complaint's [13th] cause of action, this issue would proceed to trial with everything else."

The court stated Bailey's abandonment of the election was confirmed at the trial. "Bailey put forth no evidence at trial that from that 'election' date forward she took any steps to pursue this election by proposing a valuation or offering to pay Howard anything for his interest. To obtain a stay of the dissolution, when the parties cannot agree on a valuation, Bailey was required to seek judicial intervention on this issue and post a bond, with sufficient surety, to cover expenses (including attorney[] fees) incurred by the shareholder whose shares are being purchased if the purchasing parties fail to pay

the price determined by the [c]ourt. [Citations.] She never did this, and her election rights are deemed waived.” Moreover, “Despite evidence at trial that Howard and Bailey contemplated a business valuation procedure (Exhibit [No.] 1375) there is no evidence that this valuation process was agreed to and incorporated into the fully integrated Buy-Sell Agreement (Exhibit [No.] 1374). Bailey has not complied with statutory procedures to value the shares and move her election to purchase forward.”

The court noted there was additional evidence the election was abandoned. “Further, had Bailey pursued her election to purchase, she was then required to petition the [c]ourt for a valuation and the [c]ourt would then appoint [three] disinterested appraisers to set the value which Bailey could then pay or not. Bailey sought no judicial intervention for over three years and not until the conclusion of the non-stayed involuntary dissolution matter. The [c]ourt finds that Bailey never intended to proceed with the actual valuation and purchase of Howard’s interest. She transmitted no valuation or purchase offer to Howard since filing her election nearly four years ago. (There was a reference in . . . Humphrey’s closing argument to Exhibit [No.] 1378 as an exercise of Buy-Sell Agreement, but this Exhibit is not in evidence.)”

The court stated the final reason it had authority to order involuntary dissolution was because “the parties themselves submitted the dissolution of BAMRI as one of the controverted issues.” Several issues listed in the joint statement discussed whether BAMRI should be dissolved and how best to wind it up. “In fact, the Bailey/BAMRI action is referred to as ‘Rescission, Breach of Fiduciary, Dissolution, Conversion Action.’” The court ruled “an involuntary dissolution is warranted” (bold omitted) and ordered “Bailey to render an accounting of all BAMRI income and expenses from October 25, 2009 through the present, and Bailey to return to BAMRI an amount equivalent to 50 [percent] of the personal distributions she has taken for herself over that time period, within 120 days of the finalization of the Statement of Decision.”

E. Individual Cross-Complaint

The court noted all causes of action except the first claim for slander per se were dismissed. In closing argument, Humphrey indicated Bailey was proceeding on a theory of libel per se. The court determined Bailey failed her burden of proving the business losses were proximately caused by Howard's statements and that damages were also not sufficiently proven. It found for Howard in this action.

F. Derivative Cross-Complaint

The court recognized the operative cross-complaint was the fifth amendment, which was over 155 pages long and initially asserted 29 causes of action. It noted eight defendants were dismissed after their demurrers were sustained without leave to amend. The only remaining defendant was Howard (BAMRI was a nominal defendant as required in a shareholder's derivative action).

The court ruled Bailey failed to prove Howard was liable for fraudulent concealment, intentional misrepresentation, conversion, "[c]onversion of [p]artnership assets," breach of partnership agreement, misappropriation of customer lists, interference with contractual relations, violation of unfair competition laws (Bus. & Prof. Code, § 17200 et seq.), or for punitive damages. However, it determined Howard breached his fiduciary duty by failing to put the best interest of BAMRI ahead of his own. Howard's failure to disclose his relationship with F&L and other actions breached his duty of loyalty to BAMRI. The court made the factual finding F&L was in the same industry as BAMRI, but it was not a competing business. "Howard was entitled to engage in non-competing activities, but he could not take advantage of any corporate opportunity that was available to BAMRI, which he did, with regard to F&L."

The court ultimately determined the claims lacked merit due to the lack of damages. The court concluded Howard's misconduct did not harm BAMRI. Unlike Bailey, Howard did not owe the corporation any restitution.

The court stated Howard breached the doctrine of corporate opportunity and found for “BAMRI . . . only on this cause of action.” (Bold omitted.) “Bailey established that Howard usurped a corporate opportunity by diverting a cable manufacturing business opportunity to F&L, a company he and his wife owned.” It noted the typical remedy for this claim was to disgorge any profits and discharge the officer. However, the court determined Howard’s expert “established, by a preponderance of the evidence, that there are no damages to BAMRI as a result of the F&L activity.” (Bold omitted.)

The court provided a lengthy discussion of the 13th cause of action seeking dissolution of the partnership. It noted Humphrey argued in closing the court lacked authority to dissolve BAMRI. “The [c]ourt has to wonder why, then, did Bailey plead a claim for dissolution and proceed to trial on this, her [13th] cause of action. Bailey never moved to dismiss [it,] nor did she file a dismissal of the claim. In paragraph 154, Bailey asks that a receiver be ‘immediately appointed to collect and administer rents and manage the partnership property.’ [¶] As pointed out by . . . Buley in his posttrial brief, *Judge Rodriguez in fact did appoint a receiver and he ordered an accounting*, and . . . Bailey did nothing but thwart efforts to see that to fruition. [¶] Bailey argues that a separate and independent proceeding was required before the [c]ourt could hear and determine the involuntary dissolution action. This argument was not raised prior to the commencement of trial and, in fact, the [D]issolution [A]ction was tried to [the] conclusion of evidence. In her demurrer to the 2011 [Dissolution Action], Bailey sought to have the . . . matter dismissed on the grounds that it was identical to the declaratory relief action before the [c]ourt at trial. [Citation.] Judge Rodriguez further confirmed this at the hearing to bifurcate the . . . Dissolution Action by his order on November 8, 2012 wherein he allowed the . . . Dissolution [Action] to proceed under the [d]eclaratory [r]elief allegations in the original complaint. Finally, and contrary to Bailey’s misrepresentation in her [b]rief, Howard did not dismiss the [3rd] [c]ause of [a]ction

when he filed his [r]equest for [d]ismissal of specific causes of action [¶]

Dissolution is an equitable action, which entitles the Court to order dissolution and, as part of such an order, enter any and all additional orders as justice and equity require under all the circumstances. [Citations.]” (Underline omitted.)

The court noted Bailey’s 17-page single spaced posttrial brief regarding the dissolution issue contained mostly string cites and extensive quotes from numerous cases without any discussion of the factual background of those cases. It ordered BAMRI’s involuntary dissolution and that there be an accounting as requested in Bailey’s 14th cause of action. It denied Bailey’s request during oral argument for damages for emotional distress, concluding the claim was not supported by any credible evidence.

G. Witness Credibility Issues

In its statement of decision, the court stated it was not going to summarize each witness’ testimony but it wished to discuss the issue of credibility “since that is accorded great weight on appeal.” During the month long trial, “Most witnesses were, as discussed herein, not of much help at establishing any elements of the various claims. Most of the Bailey witnesses lacked credibility based on their demeanor as witnesses, obvious alignment with Bailey, and concerted efforts to avoid directly answering questions.” It added, “In trying cases as a lawyer for close to 20 years, and then as a judge another 19, the [c]ourt has rarely seen a lawsuit in which nearly *every* witness called by both sides suffered from an inability to directly answer a question or to submit to cross-examination without arguing with the questioning lawyer. The [c]ourt appreciates that the lawyers on both sides forbore from constantly objecting to many questions. The [c]ourt was tempted to object herself, especially on Evidence Code section 352 grounds.”

VI. *New Attorney*

Sometime after Phase 2, BAMRI hired a new attorney. On December 16, 2016, BAMRI filed a substitution of attorney replacing Mancinelli with Aaron B. Fairchild (Morten Law Group.)

DISCUSSION

I. *Involuntary Dissolution of BAMRI*

In their respective appeals, BAMRI and Bailey raise several contentions challenging the court's authority to order the involuntary dissolution of BAMRI. Bailey asserts the court had no equitable authority to order a "non-statutory involuntary dissolution." BAMRI challenges the order on the grounds it was not given notice of the trial and the Dissolution Action was never consolidated with the other lawsuits. Bailey and BAMRI claim they did not abandon the election to purchase Howard's shares. As we will explain in more detail, BAMRI's first two contentions have merit.

A. *Legal Authority Regarding Special Proceeding*

"The dissolution of a corporation is an *equitable action in which jurisdiction is granted by statute*, and a court of equity is to take jurisdiction of the cause, once a requisite showing is made, and then exercise its discretion in granting or refusing equitable relief." (7B Am.Jur. Pl. & Pr. Forms Corporations § 439, italics added.) In California, section 1800 grants the trial court jurisdiction to order the involuntary dissolution of a corporation upon the verified complaint of one or more shareholders meeting the qualifications listed in the statute. (§ 1800, subd. (a)(2), (3).) The accepted grounds for dissolution are also specified by the statute and range from deadlocked factions to abandonment. (§ 1800, subd. (b)(1)-(6).)

"An action for an involuntary dissolution of a corporation is in the nature of a special proceeding in that the proceedings and relief sought are created by statute. [Citations.]" (*Weisman v. Odell* (1970) 3 Cal.App.3d 494, 496-497 (*Weisman*).) While a

shareholder or creditor of a corporation may intervene, an involuntary dissolution proceeding is against the corporation. (§ 1800, subd. (c).)

B. Analysis

Howard's Dissolution Action properly named BAMRI as the defendant. Our record shows Bailey did not intervene in the action and the Dissolution Action was not consolidated with the shareholders' lawsuits. Nevertheless, it is undisputed the trial court adjudicated the Dissolution Action in the same trial held on the shareholders' lawsuits. The court entered a judgment in the Dissolution Action on the merits in BAMRI's absence. The record shows BAMRI's counsel (Mancinelli) did not receive notice of the trial and did not participate in the proceedings. As we will now explain, this ruling must be reversed because the shareholders and their counsel were not authorized to represent BAMRI on the issue of its involuntary dissolution. We recognize the shareholders' derivative actions raised "dissolution issues" but those related to terminating the Bailey/Howard partnership not the involuntary dissolution of BAMRI. Although the shareholders led the court to believe the issue of BAMRI's dissolution was a controverted issue in the case, this was a mistake implicating BAMRI's due process rights and the error could not be waived by Bailey or Howard.

1. No Consolidation

We begin by addressing the court's comment in the statement of decision indicating the Dissolution Action was consolidated with the 315225 Consolidated Action. The record does not contain a consolidation order regarding the Dissolution Action. We recognize Judge Rodriguez's order on the bifurcation motion referenced a consolidation, but he later corrected himself and stated the Dissolution Action was a related case to the 315225 Consolidated Action. Judge Schulte's pretrial orders also acknowledged the Dissolution Action's status as a related case.

2. Dissolution Claims Not Identical

In her statement of decision, Judge Schulte commented that Judge Rodriguez previously determined the declaratory relief dissolution issues were identical to the claims raised in the Dissolution Action. Judge Schulte wrote, “Judge Rodriguez . . . confirmed this at the hearing to bifurcate the . . . Dissolution Action by his order on November 8, 2012 wherein he allowed the . . . Dissolution [Action] to proceed under the [d]eclaratory [r]elief allegations in the original complaint.” This statement about the record is incorrect.

Judge Rodriguez took steps to hear certain “dissolution issues” in a bifurcated trial. His first order regarding the matter, entered on November 8, 2012, stated the Dissolution Action was consolidated with the other lawsuits. As we explained above, this was a misstatement about the status of the Dissolution Action. In subsequent orders, both Judge Rodriguez and Judge Schulte acknowledged the Dissolution Action was a “related case” trailing behind the 315225 Consolidation Action. The November 8, 2012, order also stated the parties should be prepared for trial on “the Dissolution Action and [the] issue of dissolution of BAMRI.” The order did not say the Dissolution Action was identical to the declaratory relief action (seeking termination of the Howard/Bailey partnership). More importantly, Judge Rodriguez’s subsequent orders and comments during a discovery hearing clarified the actions were not the same. He assured BAMRI’s counsel the bifurcated trial concerned only the dissolution issues raised in the declaratory relief action (regarding the Howard/Bailey partnership).

3. Lack of Notice

BAMRI did not require notice of Phase 1 because none of Bailey’s shareholder derivative claims against Cremach concerned BAMRI. Similarly, it did not need to be notified of trial for the 315225 Consolidated Action because the adjudication of Howard’s and Bailey’s individual and derivative actions did not concern BAMRI. It did not need to make an appearance in a lawsuit it did not initiate. As a nominal

defendant and nominal cross-defendant, no causes of action were alleged against it, and therefore, BAMRI did not need to offer any defense.

However, as the sole defendant in the Dissolution Action, BAMRI certainly required notice when the trial court scheduled a trial date. Contrary to the trial court's recollection of events, BAMRI did not receive notice of the trial date.

The record shows that after Phase 1 was completed, the shareholders pressed forward with Phase 2 and were intent on litigating only one dissolution issue, i.e., BAMRI's involuntary dissolution. The first indication in the record something was amiss, was the court's minute order entered after it held a trial setting conference in the Dissolution Action. At this hearing, counsel made appearances for Howard and Bailey. Mancinelli did not attend. BAMRI asserts it did not receive notice of this hearing, however, there is nothing in the record to support or disprove this assertion. In any event, we need not resolve this issue because the minute order shows the two parties at the hearing waived notice of what was discussed. This meant BAMRI's counsel, Mancinelli, *did not receive notice* of the court decision to set a trial date for the Dissolution Action, which was the same trial date as the 315225 Consolidated Action.

There appears to be no dispute BAMRI did not receive actual notice. Rather, Howard argues BAMRI had "substantial notice" of and participated in the trial because BAMRI's two owners, who were also 100 percent of BAMRI's shareholders, were present for Phase 2, and had the opportunity to represent BAMRI's interests. The court applied this same reasoning in the statement of decision. We conclude this legal theory lacks merit. It is based on the incorrect assumption a corporation's shareholders have the authority to defend actions on behalf of the corporation. They do not.

"A corporation . . . in its corporate . . . rights and liabilities . . . is as distinct from the persons composing it, as an incorporated city is from an inhabitant of that city.' [Citations.]" (*Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 729-730.) "[T]hat a corporation can act without representation, is a fiction

we cannot accept. [Citations.] A corporation *cannot in fact appear in court except through an agent*. [Citation.] [Code of Civil Procedure] section 90 does not even purport to grant to a corporation a right to represent itself--it purports only to change the identity of the representative through whom it may appear. If we were to hold that a corporation represents itself when appearing through a ‘director, an officer, or an employee’ [citation], then it would necessarily follow that the corporate ‘self’ is comprised of directors, officers, or employees, contrary to the authorities we have noted.” (*Id.* at p. 730, italics added.) Simply stated, a corporation cannot represent itself in a court of record either in propria persona or through an officer or agent who is not an attorney. (*Ibid.*) Howard and Bailey could not act as BAMRI’s agents in court. And there was no need for a substitution because BAMRI properly hired legal counsel, Mancinelli, to represent its interests in the Dissolution Action.

This conclusion brings us to Howard’s next contention that his counsel and Bailey’s counsel adequately represented BAMRI’s interests in Phase 2. We can infer the court also believed Howard and Bailey could effectively represent BAMRI’s interests when it accepted the shareholders’ joint statement of controverted issues asking the court to rule on BAMRI’s dissolution as part of their shareholder derivative lawsuits (brought on “BAMRI’s behalf”).

Howard focuses our attention to the first day of Phase 2, when counsel for Howard and Bailey stated they were appearing on behalf of their clients “both individually and derivatively on behalf of [BAMRI].” The shareholders’ announcement of their appearance “on behalf” of the corporation was in the context of their respective shareholder derivative actions. Neither attorney had the authority to directly represent the interests of the corporation. Indeed, Mancinelli was still the counsel of record representing BAMRI.

Moreover, it would have been unethical for Howard’s and Bailey’s attorneys to represent BAMRI. Bailey’s shareholder suit “on behalf” of the corporation

was actually adversarial in nature. In a derivative action, the corporation's refusal to join is the reason why the shareholder names the corporation a nominal defendant. (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1004.) What complicates matters further is that a corporation, despite being a separate legal entity and named defendant, cannot oppose a derivative suit because the complaint alleges the action was filed on its behalf and potentially the corporation could benefit from the outcome. (*Ibid.*) “The corporation has traditionally been aligned as a defendant because it is in conflict with its stockholder over the advisability of bringing suit’ [Citation.] In a real sense, the only claim a shareholder plaintiff asserts against the nominal defendant corporation in a derivative action is the claim the corporation has failed to pursue the litigation.” (*Ibid.*) Accordingly, BAMRI had no reason to make an appearance in litigation it did not initiate and could not legally oppose. Moreover, given the corporation's status as a defendant in both derivative actions, the shareholders' attorneys are not generally permitted to represent both the plaintiff and a defendant in the same action.

The court ruled Howard and Bailey waived any objection to the court adjudicating the Dissolution Action because the issue was included in the parties' joint statement of controverted issues. This argument overlooks the fact BAMRI was not one of the parties who joined in that statement of controverted issues. While it is true a shareholder may waive issues related to his or her derivative lawsuit, the shareholder may not waive rights held by a separate legal entity represented by independent counsel.

Notice and the opportunity to be heard are fundamental due process concepts. (*In re FairWageLaw* (2009) 176 Cal.App.4th 279, 286-287 [court violated shareholder's right to due process by adjudicating claims against him in voluntary dissolution proceedings when shareholder not a party to the action].) “The federal and state Constitutions generally require that individuals be accorded procedural due process before being deprived of a protected property interest. [Citations.] This requirement ensures fair play, protects an individual's use and possession of property from arbitrary

encroachment and minimizes unfair or mistaken deprivations of property. [Citation.]” (*Id.* at p. 286.)

Moreover, “[s]ubdivision (a) of Code of Civil Procedure section 594 . . . prohibits trial of an issue of fact in the absence of a party unless it is first proven that the absent party ‘has had 15 days’ notice of such trial.’” (*Au-Yang v. Barton* (1999) 21 Cal.4th 958, 960.) “Compliance with [Code of Civil Procedure section 594, subdivision] (a)’s notice requirement is ‘mandatory.’ [Citation.] (*Id.* at p. 963.) “Proceeding to judgment in the absence of a party is an extraordinary and disfavored practice in Anglo-American jurisprudence: ‘[T]he policy of the law is to have every litigated case tried upon its merits, and . . . [r]eflecting this principle, [Code of Civil Procedure section 594, subdivision] (a) expressly puts the burden on the party seeking to proceed with trial in the absence of the opposing party to prove that the absent party received the statutory 15-day notice. The Legislature has not required the absent party to show that it did *not* receive the statutorily required notice.” (*Ibid.*) There is no evidence suggesting BAMRI’s counsel was notified the court planned to adjudicate the Dissolution Action, violating BAMRI’s right to due process and Code of Civil Procedure section 594, subdivision (a).⁷

In light of the above, we reverse the court’s judgment in the Dissolution Action. The matter will be remanded for a new trial pursuant to the special rules and procedures delineated in section 1800.

4. *Bailey’s 13th Cause of Action Unresolved*

In its statement of decision, the court recalled asking the parties about the ““trailing”” Dissolution Action and “it was agreed that this matter would no longer trail

⁷

This answers Howard’s assertion a court has the inherit authority under Code of Civil Procedure section 128, subdivision (a)(3) and (8) to “provide for the orderly conduct of proceedings” and “control its process” by trying a related case with the other lawsuits. This general rule only applies if the conduct at issue does not violate due process or the mandatory notice requirements set forth in section 594, subdivision (a).

but, given that . . . Bailey sought involuntary dissolution in her cross-complaint's [13th] cause of action, this issue would proceed to trial with everything else.” Our review of the reporter's transcript does not support the court's recollection. The court asked whether the 13th cause of action was seeking dissolution and Bailey's counsel commented there was no reason to dissolve the company if Phase 2 determined Howard was not owed any money. The court replied the shareholders' lawsuits “made it seem like both were asking for it. I could say, okay, that's off the table.” Howard's counsel stated his position “aside from the involuntary dissolution” would be that BAMRI was a “dysfunctional company” that needs to be dissolved. The parties and the court then turned their attention to other pretrial matters.

We conclude that, at best, this exchange proves the parties agreed the trailing lawsuit involved similar claims of misconduct by the corporate officers, but there was nothing to suggest they agreed Bailey sought involuntary dissolution of BAMRI. To the contrary, there is ample evidence Bailey fought Howard's efforts to dissolve BAMRI. She wanted to keep BAMRI, as evidenced by her notice of election to buy his shares. (§ 2000.)

As described in our summary of the facts, the 13th cause of action, titled “dissolution of partnership,” asked the court to terminate Bailey's business partnership with Howard. After discussing Howard's alleged misconduct, the cause of action alleges the partnership will suffer irreparable injury unless the partnership is dissolved and a receiver is immediately appointed to manage the business. The claim is brought against Howard, the other partner named in the Buy-Sell Agreement. We can infer from the allegations that Bailey wished to end her business relationship with Howard and continue BAMRI's operations without him.

Howard and Bailey's partnership relationship was controlled by a written agreement (Buy-Sell Agreement). One of the provisions discussed acceptable reasons for terminating the partnership, such as death of the shareholders or a “plan of sale.” The

parties agreed another event triggering termination of the agreement would be “dissolution of the [c]orporation.” Thus, BAMRI’s dissolution could take place before or after termination of the partnership. Neither the Buy-Sell Agreement, nor the 13th cause of action, contained language suggesting the partnership and corporation had to be dissolved simultaneously. The dissolution of a partnership involves issues of contract interpretation, whereas BAMRI’s involuntary dissolution is a special proceeding that required the court to consider a list of factors set forth in section 1800. For this reason, it cannot be said litigation of the 13th cause of action in Phase 2 would put BAMRI on notice the Dissolution Action would also be adjudicated.

Finally, it was improper for the court to construe the 13th cause of action as raising the issue of BAMRI’s involuntary dissolution because the court’s authority to dissolve is “a special proceeding in that the proceedings and relief sought are created by statute. [Citations.]” (*Weisman, supra*, 3 Cal.App.3d at p. 496.) “““Special proceedings being of statutory origin . . . do not proceed according to the course of the common law . . . but give new rights and afford new remedies. [Citation.]”” [Citation.]” (*Go v. Pacific Health Services Inc.* (2009) 179 Cal.App.4th 522, 532.) Section 1800 requires that a shareholder’s petition for dissolution must be a verified complaint. There are a limited number of acceptable grounds for granting relief requested. (§ 1800, subd. (b)(1)-(6).) Bailey’s Derivative Cross-Complaint was unverified and discussed reasons to terminate her partnership with Howard. She did not mention section 1800 or dissolution of BAMRI.⁸

⁸ We disagree with the court’s decision Bailey waived any objection to having the court treat the 13th cause of action as being identical to the Dissolution Action because BAMRI’s demurrer to the Dissolution Action raised a similar argument. BAMRI is a separate legal entity from Bailey, and its decision to file a meritless demurrer in the Dissolution Action is not relevant to Bailey’s ability to object in a separate lawsuit (Derivative Cross-Complaint).

The court did not make any ruling on the status of the Howard/Bailey partnership as defined in the Buy-Sell Agreement. In the statement of decision, the court gave reasons why it could order BAMRI's involuntary dissolution and expressed dismay Bailey's counsel objected to this remedy. It stated, "The [c]ourt has to wonder why, then, did Bailey plead a claim for dissolution and proceed to trial on this, her, [13th] cause of action." The answer is that Bailey's dissolution issue related to her partnership agreement with Howard. She did not seek dissolution of BAMRI.

It is unclear whether Bailey still wishes to pursue the claims raised in the 13th cause of action. Because we have reversed BAMRI's dissolution, the judgment no longer serves as an automatic trigger for terminating the partnership. For this reason, we remand the 13th cause of action for further proceedings and Bailey may elect to have a new trial on the claim.

5. Howard's Declaratory Relief Claim Unresolved

The court determined Howard's declaratory relief action raised in his Individual Action was moot because it requested the same relief as the Dissolution Action. We must also reverse this ruling.

The declaratory relief claim asserted that due to a "controversy" between Howard and Bailey the court must make a judicial declaration of their respective rights and liabilities under the Buy-Sell Agreement. Howard alleged Bailey refused to terminate the agreement and Howard requested "that the business relationship between Howard and Bailey be dissolved." (Capitalization omitted.) He listed several possible remedies, including "a mandatory injunction dissolving the business relationship." There was no suggestion Howard was using this cause of action to also petition the court for BAMRI's involuntary dissolution under section 1800. BAMRI is not mentioned anywhere in this portion of the complaint. Moreover, Howard filed a separate verified complaint (as required by section 1800), to petition the court for BAMRI's involuntary dissolution.

We conclude this cause of action, like Bailey's 13th cause of action, sought the remedy of termination of Howard and Bailey's partnership arrangement. The court did not rule on this issue or the other allegations raised in Howard's declaratory relief cause of action. Although Howard did not file a cross-appeal, we conclude that equity requires we remand the matter to permit Howard an opportunity to decide whether to pursue a new trial on his declaratory relief action in light of the remedy provided to Bailey on her 13th cause of action in this opinion.

6. Receiver Appointment

We recognize Bailey's 13th cause of action sought the immediate appointment of a receiver to manage the partnership property. The court appointed a receiver to help dissolve the corporation rather than to manage BAMRI's ongoing affairs. Because BAMRI's shareholders were deadlocked and could not agree on any business decisions regarding BAMRI, the appointment of a receiver was likely warranted. Nevertheless, we cannot affirm the court's ruling because the order specifically provided the receiver was to facilitate BAMRI's dissolution. This ruling would be premature given our decision to reverse the judgment in the Dissolution Action.

II. Notice of Election

The parties dispute whether there was sufficient evidence to support the trial court's determination Bailey abandoned or waived her section 2000 election to purchase Howard's shares, an action which supplants the petition seeking BAMRI's involuntary dissolution. BAMRI filed a section 2000 election in the Dissolution Action, which we have remanded for a trial with the proper parties. Bailey filed a back-up section 2000 election in the 315225 Consolidation Action. She does not explain what purpose two notices of election serves. In any event, the validity of her notice of election related to the Dissolution Action and must be considered in the context of that lawsuit. We vacate the court's ruling on abandonment of the election as being premature.

III. *Restitution Payment*

The court found in Howard’s favor in the Derivative Action’s breach of fiduciary duty cause of action. In addition to other misconduct, the court determined Bailey received \$1.3 million in income from 2009 to 2013. Bailey did not make any disbursements to Howard or provide him with an accounting. The court determined Bailey spent over \$924,000 on non-business related expenses. In its ruling, the court held Bailey must pay 50 percent of this sum “back into BAMRI for distribution to Howard upon dissolution.” The final judgment clarifies, “Howard has established Bailey disbursed \$924,000 from BAMRI for her own personal use from October 2009 through April 2013 and she must return 50 [percent] of that (\$462,000) to BAMRI for distribution to BAMRI’s 50 [percent] shareholder Howard”

On appeal, Bailey argues the court lacked authority to make this “*prejudgment* restitution payment to BAMRI.” She asserts the court ordered an additional accounting that would take into consideration her \$500,000 retained equity interest described in the Buy-Sell Agreement. She does not provide any further legal analysis or authority on this issue. The italicized language suggests Bailey believes she should not pay any money until the court ordered accounting is complete.

We conclude the argument lacks merit because there is no evidence to support her claim the court ordered a prejudgment payment. The order is part of the final judgment. It is not a prejudgment order. Because Howard presented conclusive evidence at trial that established this sum was owed, there is nothing left to adjudicate on this issue. The court had no grounds to defer the payment to BAMRI. It is irrelevant that the court also ordered Bailey to pay for an accounting to determine if additional money was owed for a different period of time she was in sole control of BAMRI’s business operations (from April 2013 to the date of the final judgment).

IV. *Bailey's Request for New Trial on Derivative Causes of Action*

Bailey maintains a new trial is required on her claims for conversion, breaches of fiduciary duties and loyalties, and misappropriation of corporate opportunity. She argues that when a judgment has been entered in an action tried without a jury, a new trial is warranted pursuant to Code of Civil Procedure sections 657 and 663. She has misread those statutory provisions. Code of Civil Procedure section 657 asserts a verdict may be vacated and a new trial granted “on the application of the party aggrieved.” Bailey did not file a motion for new trial in this case. Similarly, under Code of Civil Procedure section 663 a judgment may be set aside under certain circumstances “upon motion of the party aggrieved.” Bailey did not file a motion to set aside the judgment. This portion of her legal analysis has no relevance to her appeal from the judgment.

We understand from Bailey’s discussion of new trial motions and motions to set aside the verdict that she believes the court’s judgment was “against law” (Code Civ. Proc., § 657, subd. (6)), and contains an “[i]ncorrect or erroneous legal basis” (Code Civ. Proc., § 663, subd. (1)). She asserts this court must review these questions of law de novo. The rest of her legal argument is devoted to discussing two cases, which she asserts provide bright-line rules requiring that a trial court award damages after determining a corporate fiduciary engaged in self-dealing. (*Western States Life Ins. Co. v. Lockwood* (1913) 166 Cal. 185 (*Lockwood I*); *Western States Life Ins. Co. v. Lockwood* (1916) 173 Cal. 734 (*Lockwood II*)). She concludes, “The trial court’s refusal to require disgorgement of the ‘secret profits’ requires a new trial.”

However, a closer look at Bailey’s argument reveals the issue is not a pure legal one but sounds more like a challenge to the sufficiency of the evidence supporting the judgment. More importantly, Bailey’s theory completely disregards the court’s statement of decision discussing (1) Bailey’s failure to meet her burden of proof on certain causes of action, (2) expert testimony BAMRI was not damaged by Howard’s conduct, and (3) the need to balance the equities in this case because of Bailey’s unclean

hands. This was not a typical corporate self-dealing case where only one corporate officer undisputedly engaged in misconduct. Here, the court had to resolve disputed facts, determine the credibility of many witnesses, and weigh what equitable remedies should apply. In other words, both of the issues raised in this appeal ask us to apply legal principles to a set of undisputed facts. We reject Bailey’s contention we must apply a *de novo* standard of review.

A. *Conversion*

Bailey argues the court’s decision regarding her claim for conversion was legally incorrect. Not so. The court correctly noted in the statement of decision that CACI No. 2100 lists the essential elements required for a conversion claim. The court also appropriately recognized legal authority holding, “Money can be the subject of an action for conversion if a *specific sum* capable of identification is involved. [Citation.]” (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 452, italics added.) The court ruled in Howard’s favor on this cause of action on the grounds that Bailey’s “*generalized claim for money* is not actionable as conversion . . . [and] Bailey (on behalf of BAMRI) has not met her burden of proof entitling her to recovery under a theory of conversion.” (Italics added.) It added Howard’s claim against Bailey failed for the same reason.

On appeal, Bailey does not contend the court erred because she met her burden of proof identifying Howard’s conversion of a specific sum of money. She does not explain why this ruling is incorrect. It is not our duty to develop an argument for her, and therefore deem the issue waived.

B. *Breach of Fiduciary Duty and Duty of Loyalty*

The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 483.) “Where a breach of fiduciary duty occurs, a variety of equitable

remedies are available, including imposition of a constructive trust, rescission, and restitution, as well as incidental damages [citations].” (*Hicks v. Clayton* (1977) 67 Cal.App.3d 251, 264.) The court may also reject the use of equitable remedies in favor of damages (a remedy at law).

The court determined Howard and Bailey each breached their fiduciary duties and duties of loyalty to BAMRI. The shareholders breached these duties in different ways. Under these circumstances, the court determined equitable relief was warranted. In balancing the equities and expert testimony regarding the lack of harm to BAMRI, the court decided Bailey’s remedy would be the opportunity to follow the appropriate procedures and remove Howard as a director of BAMRI. It also determined Howard did not owe the corporation any damages.

Different standards of review apply depending on what aspect of the court’s ruling is being challenged on appeal. “We review the trial court’s exercise of its equitable powers under an abuse of discretion standard of review. [Citation.]” (*Ho v. Hsieh* (2010) 181 Cal.App.4th 337, 345.) “‘An abuse of discretion occurs only if the reviewing court, considering the applicable law and all of the relevant circumstances, concludes that the trial court’s decision exceeds the bounds of reason and results in a miscarriage of justice.’ [Citation.] In applying the abuse of discretion standard, ‘we resolve all evidentiary conflicts in favor of the judgment and determine whether the court’s decision “falls within the permissible range of options set by the legal criteria.”’ We may reverse only if the trial court’s decision “exceeds the bounds of reason, all of the circumstances before it being considered.”’ [Citation.]” (*Orange Catholic Foundation v. Arvizu* (2018) 28 Cal.App.5th 283, 292 (*Orange Catholic Foundation*)).

We apply the substantial evidence standard of review to challenges involving the trial court’s findings of fact, including its factual findings on witness credibility. (*Orange Catholic Foundation, supra*, 28 Cal.App.5th at p. 292.) “Under this standard, ‘our review begins and ends with a determination as to whether there is any

substantial evidence, contradicted or uncontradicted, to support the findings below.’ [Citation.] ‘In assessing whether any substantial evidence exists, we view the record in the light most favorable to respondents, giving them the benefit of every reasonable inference and resolving all conflicts in their favor.’ [Citation.] “[I]t is not our role to reweigh the evidence, redetermine the credibility of the witnesses, or resolve conflicts in the testimony, and we will not disturb the judgment if there is evidence to support it.” [Citation.] Where multiple inferences can be drawn from the evidence, we defer to the trial court’s findings. [Citation.] ‘If the trial court’s resolution of the factual issue is supported by substantial evidence, it must be affirmed.’ [Citation.]” (*Ibid.*)

With these standards in mind, we turn to Bailey’s first argument. She maintains, “A new trial is required despite the trial court’s finding that, in the course of [Howard’s] self-dealing and breaches of duties owed to the corporation, Howard provided value to the corporation meriting a \$900,000 offset as ‘reasonable compensation’ for his services.” She argues this remedy is legally incorrect because there is case authority prohibiting offsets or compensation. In a lengthy footnote, Bailey also argues the offset was improper because Howard was not legally entitled to receive compensation.

This legal error argument fails for several reasons. Bailey provides no supporting record references. (California Rules of Court, rule 8.204; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 (*Kim*) [reviewing court may disregard contentions unsupported by citation to the record].) We have carefully reviewed the statement of decision and did not find any language suggesting the court’s judgment compensated Howard for services or ordered an offset of any kind. Rather, the court focused on the totality of the evidence to achieve an equitable result, weighing and evaluating the actual harm caused to BAMRI when both owners/officers had unclean hands. “The equitable powers of a court are not curbed by rigid rules of law,” but rather “are broad enough to address novel conditions and meet the requirements of every case. [Citation.]” (*Lickiss*

v. Financial Industry Regulatory Authority (2012) 208 Cal.App.4th 1125, 1133.)

Bailey's argument does not suggest how the court's exercise of its equitable powers resulted in an abuse of discretion.

Bailey's second argument is the court "erred in failing to require Howard to disgorge all of the 'consulting' fees and other secret profits that Howard and F&L . . . received from Cremach and Arnold for services that Howard personally performed for those BAMRI clients." Once again, Bailey's argument ignores the court's decision to exercise its equitable authority and powers in this case. As discussed, the court weighed and compared the harmful conduct attributed to each party. Missing from Bailey's argument is any discussion of her own misconduct in relation to Howard's actions, and this omission is fatal to her argument. "The object of equity is to do right and justice." (*Orange Catholic Foundation, supra*, 28 Cal.App.5th at p. 293.)

Additionally, the argument fails because it is unsupported by any record references. (California Rules of Court, rule 8.204; *Kim, supra*, 17 Cal.App.4th at p. 979.) At trial, the parties did not agree on issues related to profits and damages. The court determined Bailey's experts and witnesses lacked credibility. It relied on Howard's expert, David Hanzich, a fraud investigator. "Hanzich opined, credibly, that there are no damages owed by Howard to BAMRI, and that both sides benefitted from the F&L relationship . . . [and h]is analysis was not rebutted."

V. Misappropriation of Corporate Opportunity

The court ruled Howard misappropriated a corporate opportunity, however, "the testimony of Howard's expert established by a preponderance of the evidence, that there were no damages to BAMRI as a result of the [misconduct]." On appeal, Bailey does not explain what part of this ruling was erroneous. We assume Bailey believes she is entitled to some amount of damages but she does not suggest why the court's reliance on the expert testimony was inappropriate. "[I]t is not our role to reweigh the evidence, redetermine the credibility of the witnesses, or resolve conflicts in

the testimony, and we will not disturb the judgment if there is evidence to support it. [Citation.]””” (*Orange Catholic Foundation, supra*, 28 Cal.App.5th at p. 292.) We affirm this ruling.

DISPOSITION

We reverse the court’s judgment entered in the Dissolution Action, the “related action” (case No. 30-2011-00473977). We also reverse the court’s factual findings and legal determination that Bailey abandoned her section 2000 notice of election. We remand these matters for a new trial with the appropriate parties. We reverse the court’s appointment of a receiver to oversee BAMRI’s involuntary dissolution.

With respect to the 315225 Consolidated Action (lead case No. 30-2009-00315225), we reverse the court’s ruling on Bailey’s 13th cause of action (Derivative Cross-Complaint—case No. 30-2009-00315229) and Howard’s third cause of action for declaratory relief (Individual Action—case No. 30-2009-00315225) and remand those claims for further proceedings in the trial court.

In all other respects, the judgment is affirmed. In the interests of justice, no party shall recover their costs on appeal.

O’LEARY, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.